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No. 85-2127

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LT. COL. BILLY MCDANIEL,
Petitioner,

v.

ROY JOHNSON and JOHN SHELLER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Third Circuit Court of Appeals erred in ruling that Air National Guard technician supervisory personnel and the New Jersey Adjutant General act under color of state law for the purposes of 42 U.S.C. Section 1983 (1982) when participating in personnel decisions resulting in the dismissal of Air National Guard technicians?

2. Whether the Third Circuit Court of Appeals erred in ruling that Congress did not intend to preclude a 42 U.S.C. Section 1983 remedy to an Air National Guard technician terminated pursuant to 32 U.S.C. Section 709(e)?

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 780 F.2d 360 (3rd Cir. 1986), *reh'g denied* (March 17, 1986) (Pet. App. 85a). A second decision detailing other aspects of the case is reported at 776 F.2d 75 (3rd Cir. 1985) (Pet. App. 45a).

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-44a) was entered on January 13, 1986. A timely petition for rehearing was denied on March 17, 1986 (Pet. App. 85a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

Respondents, Roy Johnson and John Sheller, are two New Jersey Air National Guard civilian technicians, who were removed from employment on October 6, 1981. Until their firings they each had over 12 years of unblemished, excellent service. As technicans, respondents worked for the New Jersey Department of Defense pursuant to 32 U.S.C. Section 709, the National Guard Technicians Act of 1968 (hereinafter "Technicians Act of 1968"). While they were civilian federal employees pursuant to section 709, their employment and that of petitioner [1] required membership in the National Guard and the maintenance of an appropriate rank. Respondents worked at the 108th Tactical Fighter Wing at McGuire Air Force Base in New Jersey as aircraft mechanics. They were also active in National Army and Air Technicans, American Federation of Government Employees, AFL-CIO, Local 371 (hereinafter "Local 371"), the union which represents technicians. Respondent Johnson served as chief steward, and respondent Sheller was a steward. As stewards, it was their duty to advise technicians who worked at the 108th Tactical Fighter Wing about matters affecting working conditions. Local 371 and the New Jersey Department of Defense were parties to collective bargaining agreements, which are contained in the administrative record.

During the afternoon of August 26, 1981, Mr. Johnson was approached by other technicians, who had heard that their work hours for August 31, 1981, would be altered by the agency on very short notice. Their normal Monday hours were during the day shift. However, on August 31, 1981, they were scheduled to work the evening shift. Johnson suggested to the other technicians that he would

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[1] Petitioner, Lt. Col. Billy McDaniel, is one of several similarly situated supervisors who were sued and who received an unfavorable ruling from the court of appeals on a certified controlling question of law. He alone filed the instant petition.

speak to them during their break time, assuming they had time for a break, after he contacted an agency representative. The night shift technicans had for years been entitled to a break when the work permitted. They had never been required to first seek approval from a supervisor. Rather, since the employees were responsible for maintenance and repair of airplanes, a lull in work occurred while the planes were being flown. During this period, technicians usually would take a break. Mr. Johnson, therefore, decided it would be best to get together that evening after the planes were in the air, if the employees' work schedules permitted.

That evening, after the planes were launched, several technicians, including respondents, informally gathered to discuss the shift change. At no time did respondents suggest that the employees take leave, appear at other than their normal starting time of 7:30 a.m., or follow technical orders for the express purpose of slowing down the agency. Nor did respondents at any time advocate a strike, slow down, or job action. Respondent Sheller hardly spoke at all. Respondents were not sure how to advise their co-workers and said so. Mr. Johnson later contacted another union official for advice.

On August 27, 1981, during a break, respondents advised their co-workers that they must arrive at the new hours and that the union would file a grievance or unfair labor practice charge. All technicians who were scheduled to work on August 31, 1981, arrived at the new hours.

On or about September 2, 1981, respondents each received a letter from Colonel Murphy proposing that they be fired. The letter, which was written on New Jersey Department of Defense letterhead, stated in pertinent part:

> 1. This letter is notice that I propose to remove you from your employment . . . . This proposed re-

moval is based upon your conducting an unauthorized meeting of technicians on government time and advocating a slowdown of work and disruption of the 108 TFW Mission. Specifically, the reasons are outlined below:

> "On Wednesday evening, 26 August 1981, during the approximate time period 1900-1930 hours, you conducted an unauthorized "on the clock" meeting of certain technicians in Bldg. 33-31 and during that meeting you advocated an [sic] attempted to persuade technicians present to disrupt the 108 TFW flying activity and associated maintenance functions scheduled for 31 August 1981 by reporting to work at times different than scheduled by their supervisor; by calling in for unscheduled leave and by other means necessary to slowdown the activity of the 108th TFW."

Pet. App. 92a. As the afore-quoted letter indicates, respondents were at all times acted against as either civilian employees or union representatives.

On or about October 1, 1981, Brigadier General Charles Young, the second level supervisor, issued decision letters to each respondent on New Jersey Department of Defense letterhead. The letter stated, as herein relevant:

> 1. The proposed notice of removal, 2 September 1981, informed you of a proposal to remove you from your employment with the New Jersey Air National Guard.
>
> 2. I have given full consideration to the information in your written answer . . . . I find, however, that the reasons stated in the notice of 2 September 1981, paragraph 1, are sustained. They are fully supported by the evidence and warrant your removal to promote the efficiency of the service. It is my decision, therefore, that you be removed from your employment effective 6 October 1981. . . .

Pet. App. 96a-97a. Again, the above-quoted decision letter shows respondents were removed from civilian employ-

ment. At all times relevant Brigadier General Young and Colonel Murphy were advised by petitioner, Lt. Col. Billy McDaniel, who was the agency's labor relations expert. Petitioner McDaniel's position description indicates that his responsibility is to advise "the state."

In December, 1981, respondents had a two-day hearing before Mr. Russell Newman, National Guard Appeals Examiner, pursuant to federal regulations, Technician Personnel Manual Chapter 700, and state regulations, New Jersey Air National Guard Regulation 40-13 (hereinafter "NJANGR 40-13"). Petitioner McDaniel assisted the agency representative. Mr. Newman ruled that, while the evidence was inconclusive, respondents had advocated illegal activity as charged:

> Both respondents . . . agree that there was discussion within the meeting concerning what could be done by employees in the face of management's decision to change working times . . . . Nowhere in the testimony does either appellant indicate that they attempted to halt the talk of the job action. *Therein lies the fault of the appellants. As responsible officials of the Union, they jointly held a duty and responsibility to publicly deny that they condoned any such illegal actions. Their failure to do so taints them with the same brush as if they had advocated the actions.*

Pet. App. 103a-104a [emphasis supplied]. In January, 1982, Wilfred C. Menard, Jr., as Adjutant General (Chief of Staff) and head of the N.J. Department of Defense, issued a letter, adopting Mr. Newman's findings (Pet. App. 105a-107a). Several months later respondents left the New Jersey Air National Guard, one by retirement and the other by transfer.

Deposition testimony and other evidence make clear that during the above proceeding Mr. Murphy and Mr. Young consulted with petitioner McDaniel, the agency's labor relations expert, regarding what action to take.

Both Young and Murphy acknowledged that they specifically talked with him about the appropriate administrative regulations, NJANGR 40-13, among other items. Petitioner McDaniel sent Mr. Johnson a portion of that regulation in October, 1981, following Mr. Johnson's request for information regarding his appeal rights. At no time were respondents disciplined pursuant to any military procedure.

On August 6, 1982, the respondents filed a verified complaint against the federal government and against three individuals: Adjutant General Wilfred C. Menard, Jr.; John Murphy; and Charles Young. The individual defendants are the three supervisory technicians responsible for wrongfully firing appellants from their jobs as New Jersey Air National Guard technicians.

The complaint alleged that respondents' discharges were arbitrary, capricious, not in accordance with law, and in violation of the First and Fifth Amendments of the United States Constitution. Specifically, respondents sought compensatory and punitive damages and equitable relief pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), 5 U.S.C. Section 5596, 42 U.S.C. Section 1983, and the Administrative Procedure Act, 5 U.S.C. Section 701 *et seq.* (hereinafter "A.P.A.").

In December, 1982, the government filed a motion to dismiss, arguing *inter alia* that *Bush v. Lucas*, 647 F.2d 573 (5th Cir. 1981), *aff'd*, 462 U.S. 367 (1983), and related cases prohibited a *Bivens* action by federal employees against their supervisor and that the individuals were clothed by official immunity.

The district court, in an opinion filed on March 8, 1983, denied the government's motion in most respects. In its opinion the court noted that the National Guard is both a state and federal entity and that the Third Circuit has permitted suits by technicians, pursuant to 42 U.S.C. Section 1983, against their supervisors.

In October, 1983, the government filed a second motion to dismiss, arguing *inter alia* that *Bush v. Lucas*, *supra*, and *Chappell v. Wallace*, 462 U.S. 296 (1983), mandated dismissal of this action against the individual supervisors. Pursuant to *Bush*, the district court dismissed respondents' claims against their federal supervisors, which had been brought directly under the Constitution, but retained jurisdiction of all remaining claims. The court rejected the government's arguments that *Chappell* gave them military immunity. Respondents subsequently filed an amended complaint, adding Lt. Col. Billy McDaniel as an individual defendant for his role in advising the other defendants to fire them.

On May 25, 1984, respondents filed a Motion for Partial Summary Judgment under the A.P.A. The government similarly filed a Motion for Summary Judgment under the A.P.A. and 42 U.S.C. Section 1983, arguing *inter alia* that the state action needed under section 1983 was lacking herein. Defendants also argued that the employees' constitutional rights were not transgressed. The court granted Mr. Johnson's and Mr. Sheller's Motion for Summary Judgment under the A.P.A., finding that the hearing examiner's factual findings were unsupported by the record and his conclusions were contrary to law, including the First Amendment.

The government then sought certification of a controlling question of law. By an opinion dated October 22, 1984, the district court entered final judgment as to the following parts of its July 24, 1984 order: 1) the grant of summary judgment for Mr. Johnson and Mr. Sheller under the A.P.A. (This judgment was affirmed by the court of appeals, and that decision is now final. See *Johnson v. Orr*, 776 F.2d 75 (3rd Cir. 1985).); 2) the grant of summary judgment for petitioner as to respondents' due process claims under the A.P.A. and section 1983; and 3) the denial of Mr. Johnson's request for reinstatement (Pet. App. 89a-91a).

The district court also certified the following controlling question:

> Whether, under the authority of 32 U.S.C. Section 709, the National Guard Technicians Act, technician supervisory personnel and the adjutant general of the state of New Jersey act under color of state law for purposes of 42 U.S.C. Section 1983 when participating in personnel decisions resulting in the dismissal of two technician employees?

Pet. App. 90a.

A panel of the United States Court of Appeals for the Third Circuit, one member dissenting, answered the certified question in the affirmative. It is that decision which is the subject of the present petition (Pet. App. A). In reaching its conclusion the court of appeals carefully examined the mixed federal-state nature of the New Jersey Air National Guard in order to determine if the supervisory employees in this matter, including the petitioner, acted under color of state law when they participated in the termination of the civilian employment of Mr. Johnson and Mr. Sheller. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982); *Lake County Estates Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). The court of appeals described the legislative history of the Technicians Act of 1968, as follows:

> A more express statement of congressional objectives could not be asked for, and none of these objectives suggests that Congress intended to reduce the state involvement in the Guard . . . . In explaining the provisions about adjutant generals, for example, the House Report said:
>
> > This requirement is intended to achieve two purposes:
> >
> > a) recognize the State character of the Guard and b) meet the requirement of giving the adjutant generals (who are State offi-

> cers) the statutory function of employing Federal employees.

Pet. App. 13a-14a, citing H.R. Rep. No 1823, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Code Cong. & Ad. News 3318, 3319.

In light of the above-described legislative history and the statutory language itself, the court held that the Technicians Act of 1968 did not reflect a congressional intent to so delimit the state characteristics of the National Guard as to preclude a finding of adequate action under "color of state law" to support a section 1983 cause of action by a discharged technician. The court of appeals, furthermore, found that while said Act did set forth in brief fashion an internal administrative remedial scheme for discharged technicians, it did not establish a comprehensive external remedial scheme similar to the one found by this Court in *Bush v. Lucas, supra*, to there manifest a congressional intent to preclude a section 1983 type cause of action (Pet. App. 17a-22a). On both of the foregoing legal conclusions the dissenting member of the panel of the court of appeals found to the contrary (Pet. App. 23a-44a).

REASONS FOR DENYING THE PETITION

1. There is no conflict of law among the circuit courts on the certified question of law ruled upon by the Third Circuit Court of Appeals. The court of appeals' decision herein was in response to an interlocutory appeal from a ruling of the U.S. District Court for the District of New Jersey. That appeal presented a specific controlling question of law pursuant to 28 U.S.C. Section 1292(b). The question was:

> Whether, under authority of 32 U.S.C. Section 709, technician supervisory personnel and the Adjutant General of the State of New Jersey, act under color of state law for purposes of 42 U.S.C. Section 1983 when participating in personnel decisions resulting in the dismissal of two technician employees?

The holding of the circuit court of appeals herein was that said individuals *do act under color of state law for purposes of 42 U.S.C. Section 1983.* Pet. App. 14a-17a. This decision is in conformity with rulings on the same question of law by two other circuit courts of appeals: *Rowe v. State of Tennessee*, 609 F.2d 259 (6th Cir. 1979); *NeSmith v. Fulton*, 615 F.2d 196 (5th Cir. 1979). *See also Schultz v. Wellman*, 717 F.2d 301 (6th Cir. 1983) (following *Rowe*). No federal court of appeals has reached a contrary result.

Although petitioner claims that the reasoning in both *Rowe* and *NeSmith* was flawed (Pet. 10), such an assertion does not overcome the fact that the three circuit courts of appeals that now have ruled on the legal issue here under consideration have all reached the same conclusion. In such a situation it would be inappropriate for this Court to grant the petition for a writ of certiorari. See Rule 17.1(a) of the Rules of the Supreme Court.

2. The petitioner alleges that the instant decision conflicts with decisions from other circuits. Specifically, petitioner argues that the court of appeals herein has found action under color of state law for purposes of 42 U.S.C. Section 1983 in conflict with decisions in two other circuits. The petitioner cites *Askew v. Bloemaker*, 548 F.2d 673 (7th Cir. 1976) and *Ellis v. Blum*, 643 F.2d 68 (2d Cir. 1981).[2] Those two cases, however, did not involve employees or agents of the National Guard or the provision of the Technicians Act of 1968. While it is true that these cases involved mixed federal-state activities, the mere existence of such a mixture, which is a common phenomenon, does not make the decisions relevant to the

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[2] *Askew* involved a federally conceived, staffed, and directed narcotics raid that utilized, in a limited manner, three St. Louis Missouri police officers. *Ellis* concerned certain federal Social Security Administration final decisions which followed provisional decisions made earlier by a New York state employee.

organizational peculiarities of the National Guard. The National Guard is known to be a very unusual, permanent federal-state entity of considerable complexity. See *e.g., Lasher v. Shafer*, 460 F.2d 343 (3rd Cir. 1973) and *New Jersey Air National Guard v. Fed. Labor Rel. Auth.*, 677 F.2d 276 (3rd Cir. 1982).

In the instant case New Jersey officials, including petitioner, acting at the state level without any involvement from a national headquarters, proposed and decided to terminate the respondents. The adjutant general, who effected the terminations, was at all times a state official, even though he was expected to act pursuant to federal regulations (Pet. App. 15a-16a). The Third Circuit's detailed evaluation of the administrative organization and operational activities of the New Jersey Air National Guard in this case is completely consistant with the process utilized by this Court in evaluating mixed federal-state organizations and activities for possible action "under color of state law." In addition, its conclusion in finding action "under color of state law" for purposes of section 1983 is in conformity with the decisions of this Court. *Lugar v. Edmondson Oil Co. Inc., supra*; *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); *Monroe v. Pape*, 365 U.S. 167 (1961).

3. The court of appeals' decision properly concluded that the Technicians Act of 1968 neither created a comprehensive remedial scheme for disciplined technicians, such as the respondents herein, nor precluded the availability of an already existing statutory remedy, such as a 42 U.S.C. Section 1983 cause of action. Hence, this Court's ruling in *Bush v. Lucas, supra*, was found not to be controlling. As stated by the majority opinion in the court of appeals:

> The context in which the 1968 Act was passed suggests that the provisions establishing a "remedial scheme" were designed merely to clarify the internal procedures and authority of the Guard in the wake

> of the technicians' new status as federal employees. There is no evidence in the legislative history that Congress was crafting a comprehensive remedial scheme intended to preclude other remedies available to technicians. Indeed congressional discussion of the statute is almost entirely bereft of reference to either Section 709 (e) specifically or the statute's role in creating a remedial scheme generally.

Pet. App. 22a, n.17. The "remedial" scheme of the Technicians Act of 1968 is clearly much more limited than those discussed in the cases inappropriately relied upon by the petitioner, *i.e.*, *Middlesex City Sewage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 (1981) (Federal Water Pollution Control Act intended as exclusive remedy) and *Smith v. Robinson*, 104 S. Ct. 3457 (1984) (Education of the Handicapped Act intended as exclusive remedy).

Furthermore, in *Bush* the remedial administrative scheme involved the right to appeal a termination to a neutral quasi-judicial agency, *i.e.*, the Merit Systems Protection Board, while pursuant to section 709(e)(5) of the Technicians Act of 1968 discharged technicians, such as the respondents, are only provided the right to appeal internally to the same adjutant general who took the action against them. 32 U.S.C. Section 709(e)(4) (Pet. 2-3).

Finally, it should be noted that the prefatory language found in 32 U.S.C. Section 709(e) does not prohibit additional judicial remedies, such as a section 1983 cause of action, which might be available to discharged technicians like the respondents, but prohibits only additional administrative remedies that might conflict with those found in the Act. *New Jersey Air National Guard v. Federal Labor Relations Authority, supra* (Pet. App. 17a-22a).

4. The court of appeals issued its decision herein concerning an interlocutory appeal on a specific certified

question of law which did not in any way include the issue of whether military discipline or national security would be impaired if a section 1983 suit were allowed. Since no evidence on this issue was entered at the district court level, and since this issue was not certified to, or ruled upon, by the court of appeals, this issue is not ripe for consideration by this Court. There is clearly no evidence of record supporting petitioner's assertion that the ruling of the court of appeals endangers national security. In fact, the U.S. District Court judge who permitted, pursuant to 28 U.S.C. Section 1292(b), the interlocutory appeal ruled upon by the court of appeals, remains prepared to hear evidence on this issue (Pet. App. 77a-80a). It should also be noted that each of the cases cited by the petitioner with regard to its "endangering of national security" argument arose in a wholly military context and did not, as in the instant situation, involve dual status civilian employees of a National Guard unit. See *e.g.*, *United States v. Muniz*, 374 U.S. 150 (1963), which is cited by petitioner (Pet. 16).

The arguments of the *amicus curiae*, the Adjutants General Association of the United States, are likewise based on the assumption, not supported by any evidence in the record, that the civilian job activities of the respondents herein were totally military in nature. Based on this unsupported assumption, the *amicus* brief proceeds to argue that to permit section 1983 actions by guard technicians against their supervisors will create a threat to national security (Brief of Amicus Curiae at 4-11). This potentially important argument, however, is clearly not now ripe for review by this Court. In addition, said matter was not raised by the petitioner in his brief and, hence, should not be considered. *United Parcel Service Inc. v. Mitchell*, 451 U.S. 56 (1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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